No. 07-625

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

CITY OF HEALDSBURG,

Petitioner,

v.

NORTHERN CALIFORNIA RIVER WATCH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court review the Ninth Circuit's affirmance of a trial court's determination that a municipal sewage treatment plant requires an NPDES permit issued under the Clean Water Act before it may discharge partially treated wastewater into a pond that is part of an extensive system of wetlands adjacent to, and hydrologically connected with, the navigable-in-fact Russian River?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Northern California River Watch states that it is a nonprofit corporation that has no parent corporations or publicly held stock.

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INTRODUCTION

This case is about Petitioner's discharge of partially treated wastewater from its treatment plant without a Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit into an abandoned gravel pit that has, over more than 23 years since gravel extraction has ceased, become a pond with extensively developed wetlands and aquatic wildlife.[1] The wetlands around the pond, called Basalt Pond, are immediately adjacent to the undisputedly navigable-in-fact Russian River. The facts show that the pond and its wetlands are hydrologically and hydraulically interrelated with the Russian River. Were it not for a man-made levee that has been rebuilt numerous times (after washouts) since the time when Petitioner began discharging into Basalt Pond, the Russian River would inundate Basalt Pond annually during the rainy season. (Petition Appendix B, p. 26a). As it is, the wetlands surrounding Basalt Pond, and the pond itself, intermingle hydrologically, ecologically, and chemically with the Russian River.

Petitioners seek review of an extensively litigated case that factually shows the effects of the discharges into the pond on the chemical and physical integrity

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[1] At one-half mile long and one-quarter mile wide, Basalt Pond is one of the largest ponds along the Russian River, providing important still water habitat for wildlife.

of the adjacent river. In addition, the biological relationships of the two waterbodies are well established in the record. The Petitioner, as it did at the Ninth Circuit, has misrepresented several important findings of fact by both the trial and appellate courts to try to persuade this Court to take up review of this case. Consequently, the questions presented by Petitioner do not fairly represent the holdings of the lower courts. Furthermore, the legal basis of the Ninth Circuit's affirmance is consistent with rulings of the other appellate courts that have decided these issues both after and before this Court's ruling in *Rapanos v. United States,* 126 S.Ct. 2208 (2006). To overcome the intrinsically fact-bound nature of this case Petitioner tries, and fails, to create a split among the circuits, and also adds a few unsupported statements about the national implications of the Ninth Circuit's ruling. Because none of these arguments has merit, review is not warranted and the petition should be denied.

STATEMENT OF THE CASE

The complaint alleging discharges of pollutants in violation of section 301 of the Federal Water Pollution Control Act (commonly known as the Clean Water Act), 33 U.S.C. § 1311, was originally filed by Respondent Northern California River Watch ("River Watch") in 2001, and an amended complaint was filed in 2003. According to Petitioner City of Healdsburg, the discharges of wastewater into Basalt Pond and its

wetlands have no effect whatsoever on the Russian River. In order to make this claim, Petitioner reinvents facts found by the district court and accepted by the appellate court that specifically contradict its position and twists statements from the appellate affirmance in order to fashion its questions presented and present its case. Petitioner made similar misrepresentations at the appellate level.[2]

The key findings for this Court's consideration, made by the district court after a four-day bench trial and a separate post-trial hearing, include that Basalt Pond had not been excavated since 1984 and thus was abandoned (Pet. Appendix B, p. 27a); that extensive wetlands are present around Basalt Pond,

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[2] River Watch extensively documented the misstatements of fact. In its appellate response brief (footnote 9, pp. 7-8), River Watch documented 11 significant factual misstatements. Petitioner repeats many of the same factual inaccuracies to this Court. Four examples of key facts incorrectly presented by Petitioner are: (1) that pollutants from the wastewater, while not all of the pollution, do indeed reach the Russian River (compare Petition, pp. 11-12 with Pet. Appendix A, pp. 5a-6a; Appendix B, pp. 31a-32a, 48a); (2) the aquifer in the area of the pond does indeed exceed drinking water standards for certain constituents (compare Petition, p. 10 with Pet. Appendix B, p. 48a, 61a (citing River Watch Finding of Fact 25)); (3) the pond and its wetlands are separated from the Russian River by a man-made levee, not natural uplands as Petitioner claims (compare Petition, pp. 35, 36 n.3 with Pet. Appendix A, p. 4a and Appendix B, p. 26a ("[t]o a minor extent, a vestige of uplands remain in some places near the pond, but they are below the levee top[..]."); and (4) that the wastewater was not found to reside in the pond in excess of one year (compare Petition, p. 11 with Pet. Appendix B, p. 30a).

including the areas next to the man-made levee separating the pond from the Russian River (*id.*, pp. 28a-29a, 45a); that the pond and the Russian River have intermingled continuously for weeks and months during washouts of the man-made levee that separate the two waters by as little as 50 feet (*id.*, pp. 25a-26a) and have had other intermittent surface connections during flooding, including in 2004 (*see*, *e.g.*, *id.*, p. 26a and post-trial hearing (not provided)); that the wetlands of the pond support many of the same biological elements, such as fish, animals, plants, and birds, that are present in both waterbodies (Pet. Appendix A, pp. 14a-16a; Appendix B, pp. 28a-29a); that the pond's wetlands are "indistinguishable from the rest of the Russian River ecosystem" and similar to the natural wetlands and tarns along the river (Pet. Appendix B, pp. 28a-29a); that the pond is in constant hydrological and hydraulic connection with the Russian River (*id.*, pp. 32a-33a); that Healdsburg has discharged between 420 and 455 million gallons of partially treated wastewater per year into the pond (Pet. Appendix A, p. 5a; Appendix B, p. 29a) and the pond discharges over 223,000 gallons of water per day to the Russian River (*id.*, p. 61a (adopting River Watch Finding of Fact 15))[3]; that the current Basalt Pond is not the original pond used by Healdsburg, was not designed to meet

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[3] The district court did not discuss all of its findings of fact in its opinion, but did adopt additional stipulated facts and numerous, detailed findings of fact proposed by the parties. Pet. Appendix B, pp. 61a-62a. For brevity, the full findings of fact adopted by the district court are not presented at this time.

the requirements of the Clean Water Act (*id.*, p. 47a); that Healdsburg's discharges did not comply with Clean Water Act requirements (*id.*, pp. 29a, 34a); that at least 12 types or classes of pollutants from the pond reach the Russian River (*id.*, p. 61a (adopting River Watch Finding of Fact 22)); and that at least some of the pollution of the Russian River was "as a direct result of Healdsburg's discharge of sewage into the Pond" (Pet. Appendix A, p. 6a; Appendix B, pp. 30a-32a). In 2005, as part of the relief ordered by the trial court in 2004 (Pet. Appendix B, p. 63a), Petitioner obtained an NPDES permit and has been operating under the Clean Water Act since.[4]

The six questions presented by the Petitioner each have factual and legal flaws that were addressed in detail by the trial court and appellate court. In fact, the Ninth Circuit rewrote part of its opinion of August 2006 and reissued the decision concerning legal questions of adjacency in August 2007. Pet. Appendix A, p. 2a. Petitioner seeks review of virtually all of the lower courts' rulings against them, many of which are heavily fact-based. Healdsburg did not preserve the fact-based challenges because it failed to present these issues for appeal at the appellate stage.

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[4] The fact that Petitioner has obtained and is now operating under an NPDES permit raises additional questions of mootness that would need to be addressed before the other legal issues raised by Petitioner, if review were granted.

REASONS TO DENY THE WRIT PETITION

I. THE NINTH CIRCUIT PROPERLY APPLIED THE LEGAL PRINCIPLES CONCERNING ADJACENT WETLANDS BASED IN LARGE PART UPON DISTRICT COURT FINDINGS OF FACT ESTABLISHING CHEMICAL, PHYSICAL AND BIOLOGICAL CONNECTIONS BETWEEN THE WATERS INTO WHICH PETITIONER DISCHARGED AND THE ADJACENT RUSSIAN RIVER.

A. The Courts' Findings Demonstrate the Extensive Relationship Between the Adjacent Wetlands and the Russian River, But Do Not Include a Finding That An Aquifer Itself Is a Wetland.

Petitioner's first "Question Presented" rests on a serious mischaracterization of the Ninth Circuit's holding concerning the aquifer connecting the wetlands of Basalt Pond with the Russian River. The court never held that the aquifer itself constituted a wetland, as Petitioner represents. Petition, pp. i, 7.[5]

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[5] Petitioner claims that the Ninth Circuit *in effect* equated wetlands with a subterranean aquifer (though it did not so do expressly), because it based its holding that wetlands were present on the existence of saturated soils (which are characteristic of both wetlands and aquifers) without addressing the additional requirement of the presence of wetlands vegetation (which distinguishes wetlands from aquifers). But Petitioner ignores the express finding of the district court that the Basalt Pond wetlands contain wetlands vegetation – a finding that Petitioner did not and could not demonstrate to be clearly erroneous on appeal.

The court instead found that the aquifer constituted a conduit for the "continuous passage of water between Basalt Pond and the [adjacent] Russian River." Pet. Appendix A, pp. 8a-9a. Contrary to Petitioner's assertions, nowhere did either the trial or appellate court hold that the aquifer was a subterranean "adjacent wetland." Petition, p. 17. The Ninth Circuit, in fact, held that Basalt Pond, because of the "extensive wetlands" inextricably interwoven with the pond waters, met the federal "adjacent wetlands" definitions of 33 C.F.R. § 328.3(c). Pet. Appendix A, pp. 7a-9a.

The Ninth Circuit properly framed the issue as one of "whether Basalt Pond and wetlands in it are isolated waters, or whether they constitute wetlands within the meaning of the regulations and within the scope of *Riverside Bayview Homes* and *Rapanos*." *Id.*, p. 8a. Relying on the well-developed factual findings of the trial court, the court held that Basalt Pond was not isolated because the pond and its wetlands discharged both through the levee wall to the river and through the pond bottom to the aquifer, which in turn discharged to the immediately adjacent Russian River. *Id.*, pp. 8a, 14a. These facts, along with other factors such as the extensive wetlands of Basalt Pond and their proximity to traditionally navigable waters, distinguish this case from the isolated gravel pit that was the subject of this Court's ruling in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). Furthermore, the court in part relied on this Court's still

valid ruling in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), to hold that the "extensive wetlands" system of which the pond was a part was adjacent to the Russian River. Pet. Appendix A, pp. 8a, 14a.

It is important to note that this case, unlike *Riverside Bayview*, *SWANCC* and *Rapanos*, which all involved wetlands development permitting, involves the discharge of pollutants into one surface body of water and the subsequent discharge of those pollutants to a navigable water. Thus, we are really dealing with the province of the Environmental Protection Agency (EPA) and its mandate to regulate the discharge of pollutants under section 402 of the Clean Water Act, 33 U.S.C. § 1342, rather than the filling or alteration of wetlands under section 404 of the Act, 33 U.S.C. § 1344, which is equally under the purview of the Army Corps of Engineers and the EPA. Because of the record in this case, River Watch need not go into detail about the differences in the two programs in this Response. All of the detailed findings of fact by the trial court, none of which were formally challenged by Healdsburg at the appellate level, and all of which were adopted by the Ninth Circuit, show the multitude of chemical, physical and biological connections between the pond and its wetlands and the Russian River that confer Clean Water Act jurisdiction in this case. *See, e.g.*, Pet. Appendix A, p. 14a. This Court's holding that the discharges were subject to the Act comports with the Clean Water Act's preeminent objective "to restore and maintain the

chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

B. There Is No Real Conflict Among the Circuits.

There is, in any event, no genuine conflict among the circuits about whether discharges to ground water hydrologically connected to surface waters may be regulable under the Clean Water Act. No other court of appeals has held that discharges of pollutants to one surface water that reach an adjacent, traditionally navigable water via ground water are not subject to Clean Water Act requirements. In its first question, Petitioner confuses the questions addressed in the First, Fifth, and Seventh Circuit cases Petitioner cites with the very different issues in this case. The cases cited by Petitioner all unremarkably hold, and this case does not hold to the contrary, that ground water itself does not constitute "waters of the United States." The key fact in one case involved the discharge of pollutants *onto dry land* that seeped into ground water and eventually reached surface waters in the area. *Rice v. Harken Exploration Co.*, 250 F.3d 264, 271-72 (5th Cir. 2001). In contrast, Petitioner discharged pollutants directly into a waterbody that then transmitted the pollutants to the hydrologically connected adjacent river through surface wetlands and the wall of a man-made levee as well as through a closely connected aquifer. Pet. Appendix A, p. 5a ("wastewater is *partially* cleansed

as it passes through the *bottom and sides* of the [pond]") (emphases added).

The important difference between this case and the Seventh Circuit case cited by Petitioner is that in the Seventh Circuit case there were no specific findings that the pollutants discharged to ground water in fact immediately and directly reached adjacent surface waters. The connection was only speculative. *See Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994), *cert. denied*, 513 U.S. 930 (1994). Another Seventh Circuit case specifically noted that it was not ruling on the type of fact scenario present in this case when it ruled that ground water was not covered by the Clean Water Act. *Inland Steel Co. v. EPA*, 901 F.2d 1419, 1422 (7th Cir. 1990) ("navigable waters might include ground waters connected to surface waters"). Similarly, the Fifth Circuit did not address the issue of discharges directly to ground water reaching surface water. *Exxon v. Train*, 554 F.2d 1310, 1312 n.1 (5th Cir. 1977). Furthermore, EPA does, on a case-by-case basis, prohibit discharges of pollutants to ground water that are connected to "waters of the United States" through NPDES permits. *See, e.g.*, 68 Fed. Reg. 7176, 7216-17 (Feb. 12, 2003) ("Nothing in this rule shall be construed to expand, diminish, or otherwise affect the jurisdiction of the Clean Water Act over discharges to surface water via groundwater that has a direct hydrologic connection to surface water.").

The First Circuit case Petitioner relies on says nothing more than that ground waters as a class are not waters of the United States. *Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438 (1st Cir. 1992). This case involved a determination of whether ground waters constituted aquatic habitat for purposes of an environmental review of a development project that impacted wetlands, not whether pollutants were being transferred from one surface water to another via a ground water conduit. *Id.* at 1450-51. For this reason, *Town of Norfolk* is inapposite and presents no conflict. The First Circuit even acknowledged that where ecological judgments about ground water and surface water connections are involved they should be decided on a case-by-case basis in the first instance. *Id.* at 1451. Such a statement, even if in dicta, is consistent with the decision in this case.

In the present case, the court did not rule that the ground waters were "waters of the United States" but instead found that the ground water acted as a conduit for discharges of pollutants from the pond to the Russian River. Pet. Appendix A, p. 8a. This conduit between the two waters was one of the many facts which led the court to hold that the wetlands had a significant nexus with, and were adjacent to, the navigable Russian River.[6]

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[6] Should this case be granted review, Respondent will raise additional grounds for affirmance. One ground is that when discharges of pollutants to surface waters hydrologically connected to navigable-in-fact waters occur, then the surface waters

(Continued on following page)

The third question raised by the Petitioner is related to the adjacency issue. The Ninth Circuit distinguished the instant case from *San Franciso Baykeeper v. Cargill Salt Div.*, 481 F.3d 700 (9th Cir. 2007), finding that, unlike the pond in *Cargill* where no wetlands were present and no factual connections to the nearby navigable waterway were established, Basalt Pond contained extensive wetlands that were adjacent to a navigable water and met the significant nexus test because of its many chemical, physical and biological connections to the Russian River. Pet. Appendix A, pp. 8a-9a, 16a. Among other things, the court relied upon the regulatory definition of adjacent wetlands, including wetlands separated from navigable waters by man-made levees like the one present in this case, to find statutory jurisdiction. *Id.* If this petition were accepted, the question of whether adjacency of an open waterbody to a traditionally navigable water is sufficient to confer jurisdiction, as discussed in *Cargill*, would require attention.[7] But

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into which the discharges occur must themselves become waters of the United States for purposes of complying with the Clean Water Act NPDES system established pursuant to 33 U.S.C. § 1342. The other ground is that, at the very least, the surface water into which a polluter discharges constitutes a "point source" under 33 U.S.C. § 1362 (14). Either way, an NPDES permit is required for such discharges.

[7] In addition, the question of whether ground water can constitute a tributary under substantively similar EPA and Corps of Engineers regulations defining what constitutes waters of the United States would be at issue. *See* 40 C.F.R. § 230.3(s) and 33 C.F.R. § 328.3(a), respectively.

regardless of how that question were decided, *Riverside Bayview* would still confer Clean Water Act jurisdiction over the adjacent wetlands present in Basalt Pond, and no court of appeals has held otherwise on comparable facts.

C. There Is A Significant Nexus Between Basalt Pond and Its Wetlands and the Russian River.

Questions five and six presented by Petitioner relate to whether the "significant nexus" test proposed by Justice Kennedy in *Rapanos* is legally proper and, if so, how it should be factually applied in this case. With respect to the legal issue presented by question five, Petitioner contends that the courts of appeals are in conflict about how to apply *Marks v. United States,* 430 U.S. 188 (1977), and related holdings, to the fractured opinions in *Rapanos*. The question in *Marks* boils down to how to discern whose opinion is controlling where there is no majority opinion, as in *Rapanos*. Contrary to Petitioner's assertion, however, *this case* does not present any conflict among the lower courts over the application of *Marks* to *Rapanos*. All the courts of appeals that have addressed the question agree that an opinion that would be joined by a majority of justices may be used to decide the facts before them and thus that where, as in this case, the test set forth in Justice Kennedy's concurring opinion is satisfied, there is Clean Water Act jurisdiction. *See United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006), *cert. denied*,

128 S.Ct. 375 (2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006), *cert. denied*, 128 S.Ct. 45 (2007); *United States v. Robison*, 2007 WL 3087419 at *11 (11th Cir. 2007); *Northern California River Watch v. Healdsburg*, (Pet. Appendix A, p. 3a).

The only nascent disagreement among the circuits is over whether there would *also* be Clean Water Act jurisdiction in the purely hypothetical case where Justice Kennedy's test is not satisfied but the test proposed by the *Rapanos* plurality opinion is. Compare *Johnson* (adopting position that satisfying either test suffices) with *Healdsburg*, *Gerke* and *Robison* (Kennedy concurrence test is controlling). This theoretical disagreement would not be outcome-determinative in this case, and the case therefore presents no occasion for this Court to resolve it. In the unlikely event that a court of appeals ever addresses and decides a case where the issue actually determines the outcome, a genuine conflict may someday arise. Until such an unlikely event occurs, however, any disagreement is merely abstract and theoretical, and does not require the Court's attention.

The Petitioner's request for review of the application of the "significant nexus" test in question six asks this Court to second-guess the extensive factual findings of the trial court – unchallenged by Healdsburg on appeal – that were applied by the Ninth Circuit to the legal standards discussed by this Court in *Rapanos*. While phrased by Petitioner as a misapplication of the significant nexus test, the fact-bound

holding of the Ninth Circuit is the epitome of an issue that is not a ground for granting certiorari.

The Ninth Circuit's careful assessment of all the evidence demonstrates that its conclusion that the Kennedy test was satisfied here is manifestly correct. The district court went through a four-day bench trial that resulted in detailed findings of fact concerning, among other things,[8] the extensive (and undisputed) presence of wetlands in the pond adjacent to the indisputably navigable-in-fact Russian River, the transfer of pollutants from the Petitioner's discharges to the pond and subsequently to the Russian River, the extensive biological interrelationships of the pond and the river, the actual and anticipated intermittent surface connections between the pond and the river, and the constant subsurface flows from the pond and its wetlands to the river through both the sides of the man-made levee and the hydrologically connected aquifer.

The Ninth Circuit's conclusion. could hardly be clearer:

> In sum, the district court made substantial findings of fact to support the conclusion that Basalt Pond has a significant nexus to the Russian River. The Pond's effects on the Russian River are not speculative or insubstantial. Rather, the Pond significantly affects the

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[8] *See* Pet. Appendix B, pp. 61a-62a ("significant nexus" facts include River Watch's Findings of Fact Nos. 14, 15,18-23, 31-39).

> physical, biological and chemical integrity of the Russian River [. . .]."

Pet. Appendix A, p. 16a. *See also, e.g.,* Pet. Appendix B, p. 48a ("The record shows that excessive amounts of chloride from Healdsburg's effluent in fact pollute the river."). Petitioner offers no reason why this Court should second-guess two lower courts on such a fact-specific issue.

II. THE EXCAVATION AND WASTE TREATMENT EXEMPTIONS PROFFERED BY PETITIONER PRESENT NO CONFLICTS AMONG THE CIRCUITS OR SUBSTANTIAL ISSUES OF NATIONAL IMPORTANCE.

Question two presented by Petitioner concerning deference to an agency interpretation of what "excavation" means hardly warrants a response. There is not even a proffered conflict among the circuits on the issue decided by the courts below. There is no factual dispute that excavation ceased in 1984. Pet. Appendix A, p. 19a. Furthermore, Petitioner relies heavily upon conclusions reached by an Army Corps of Engineers program staffer who wrote a letter, signed by his supervisor, to the effect that Basalt Pond was not subject to the Corps' jurisdiction under section 404. Nowhere did the letter mention discharge of wastewater, which is under the purview of EPA and section 402. *See* Pet. Appendix D.

Even with those issues to the side, the Corps' letter was found, based on numerous facts in the record including weighing witness credibility at trial, to be arbitrary and capricious and otherwise not in accordance with law. Pet. Appendix B, p. 61a (adopting River Watch Conclusion of Law 32). Based upon the district court's findings of failure to investigate (*id.*, pp. 54a-56a), the personal relationship between the Corps' staffer and Syar (the owner of the gravel mine) principals (*id.*, pp. 54a, 56a-57a), failures to follow agency processes (*id.*, pp. 54a-57a), and other related findings (*id.*), the Ninth Circuit properly did not even deign to address to Petitioner's arguments about deference to the agency. Findings by the trial court on such factually intensive matters are not the type of matters that warrant appellate review, let alone this Court's attention.

The waste treatment exemption for which Petitioner seeks review under question four similarly fails to raise any conflicts among the circuits. Petitioner does not even cite any cases supporting its position on this issue. On the merits, there was no dispute that the discharges into Basalt Pond did not meet Clean Water Act requirements. Pet. Appendix B, p. 29a. There was also no dispute that Healdsburg discharged to abandoned mining pits, including Basalt Pond, that were not designed to meet Clean Water Act standards. *Id.*, p. 47a. Thus, as the Ninth Circuit correctly held, relying on EPA regulations, only ponds that are either self-contained or incorporated into an NPDES permit are considered waste

treatment systems potentially exempt from Clean Water Act coverage. Pet. Appendix A, pp. 17a-18a. Simply put, Petitioner failed to meet its burden to prove that its discharges met the waste treatment exemption requirements and the facts show that the exemption does not apply to Petitioner's situation. There is no issue here meriting this Court's attention.

CONCLUSION

For the reasons stated above, particularly that there are no significant conflicts among the circuits, that the decision of the Ninth Circuit is based on extensive findings of fact by the district court, and that the Ninth Circuit correctly applied settled law to the unique and complex facts found by the district court, Respondent asks that this Court deny the petition for a writ of certiorari.

DATED: January 14, 2008

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